(2)

No. 90-1322

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

SNOW MOUNTAIN PINE COMPANY,

Petitioner,

v.

THE PUBLIC UTILITY COMMISSION OF THE STATE OF OREGON,

Respondent,

and

CP NATIONAL CORPORATION, a California corporation,

Respondent,

and

OREGON TRAIL ELECTRIC CONSUMERS COOPERATIVE, INC.,

Intervenor/Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oregon

JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented by Snow Mountain Pine Company's Petition are:

1. Whether it is proper to seek review of a 1987 decision of the Oregon Court of Appeals *(Snow Mountain I)* by a Petition for a Writ of Certiorari from a 1990 order of the Oregon Supreme Court denying review of a 1990 decision of the Oregon Court of Appeals *(Snow Mountain II)* adhering to its 1987 decision in *Snow Mountain I* and ruling that the Oregon Public Utility Commission complied with its instructions on remand?;[1]

2. Whether it is proper to seek a Writ of Certiorari based upon alleged violations of provisions of the U.S.

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[1] Snow Mountain's Petition does not comply with the Rule 14.1(k)(i) requirement that the 1990 decision of the Oregon Court of Appeals in *Snow Mountain II* be set forth in the Appendix to the Petition. The full opinion reads:

> "PER CURIAM
>
> "Snow Mountain Pine Company appeals from a decision of the circuit court affirming an order of the Public Utility Commission (PUC) on remand from this court. *Snow Mt. Pine Company v. Maudlin*, 84 Or App 590, 734 P2d 1366, *rev den* 303 Or 591 (1987). It contends that PUC's decision is inconsistent with our remand instructions or, in the alternative, that our opinion and remand instructions were wrong. We adhere to our opinion and conclude that PUC complied with our instructions on remand.
>
> "Affirmed." (102 Or App at 689, 795 P2d at 611)

QUESTIONS PRESENTED – Continued

Constitution when petitioner raised no such constitutional issues in the Oregon Appellate Court proceedings sought to be reviewed?; and

3. Whether there is any reason to grant the requested Writ of Certiorari when the claim to excessive cogeneration purchase rates is patently inconsistent with the unambiguous "avoided cost" price provisions of PURPA, the Federal Energy Regulatory Commission's PURPA regulations, Oregon's PURPA statutes and the Oregon Public Utility Commission's PURPA rules?

RULE 29.1 STATEMENT AND LISTING OF PARTIES

For clarification, we wish to supplement Petitioner's statement, as follows:

The correct designation of the first listed Respondent is the Public Utility Commission of the State of Oregon ("OPUC"). Under PURPA and the Federal Energy Regulatory Commission's ("FERC") PURPA regulations it is charged with administering PURPA in Oregon.

Oregon Trail Electric Consumers Cooperative, Inc., ("Oregon Trail") is an Oregon non-profit corporation which acquired all of CP National's ("CPN") Oregon electric utility properties and operations in 1988 and is, thus, the successor in interest of CPN's rights and obligations. Oregon Trail was not a party to the appeal in *Snow Mountain I*.

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SUPPLEMENTAL STATEMENT OF THE FACTS

We submit the following Supplemental Statement of Facts to clarify the issue which was presented and resolved in the Snow Mountain litigation.

A. The Price Dispute And Its Source

Under the Public Utility Regulatory Policies Act ("PURPA") Snow Mountain was entitled to generate and sell electric power to CPN. "[T]he obligation to purchase power," as noted in *Snow Mountain I*, "is imposed by law on a utility; it is not voluntarily assumed." (Pet App at B46, 84 Or App at 599, 734 P2d at 1370)

Snow Mountain tendered PURPA power to CPN on July 6, 1983, but demanded payment of rates based upon Idaho Power Company's avoided costs, not CPN's. As stated in *Snow Mountain I* (Pet App, pp B44-45), because CPN would not agree to pay the high avoided costs of Idaho Power Company unless the OPUC would allow CPN to pass the resulting high rates through to its customers, Snow Mountain filed a complaint with the OPUC under a Commission rule which authorized the Commissioner to set the proper price. (Pet App B45-47)

Under PURPA the power purchase rate must be " * * * just and reasonable to [ratepayers] and in the public interest" [16 USC § 824a-3(b)], and this result is ensured by a provision limiting the rate to no more than the utility's "incremental cost of alternative electric energy" [16 USC § 824a-3(d)], or the cost that the utility would otherwise incur for the same power. This non-subsidy principle was clearly explained in *Greensboro*

Lumber Co. v. Georgia Power Co., 643 F Supp 1345 (ND Ga 1986), *aff'd*, 844 F2d 1538 (11th Cir 1988), as follows:

> " * * * Congress expressly provided in PURPA that utilities should not pay qualifying facilities such as Greensboro a price in excess of the utility's 'incremental cost . . . of alternative electric energy.' 16 U.S.C. § 824a-3(b). This provision was enacted because PURPA was 'not intended to require the ratepayers of a utility to subsidize cogenerators or small power producers.' (citation omitted) The congressional purpose in limiting the price to qualifying facilities was to ensure that PURPA did not become a utility-funded welfare program for qualifying facilities, since such 'funding' would essentially come from the pockets of electric consumers. The 'full avoided cost' (the term used in FERC's rules) or 'incremental cost' (the term used in PURPA) ceiling ensures that payments to qualifying facilities will not increase a utility's overall costs. In fact, the rates charged to consumers will remain the same 'for, by hypothesis, the utilities would have incurred the same costs had they generated the energy themselves or purchased it from other sources instead of purchasing from a qualifying facility.' *American Paper Institute*, 461 U.S. at 415 n. 9, 103 S.Ct. at 1929 n. 9 (1983)." (643 F Supp at 1369, n 30)

The price dispute stemmed from the law's definition of "avoided costs," and the fact that CPN was a non-generating utility which purchased all of its electric power needs wholesale from Idaho Power Company at rates set by the FERC. Under PURPA [16 USC § 824a-3(d)], the FERC's PURPA regulations [18 CFR § 292.101(b)(6)], Or Rev Stat 758.500(5) and the OPUC's PURPA rules [Or Admin Rule 860-29-010(1)],

> " 'Avoided cost' means the incremental cost to a public utility of electric energy or capacity, or both, which the public utility would generate itself *or purchase from another source* but for the purchase from a cogeneration facility or a small power production facility." (emphasis added)

Snow Mountain contended that CPN must pay the "avoided costs" of its supplier, Idaho Power Company ("IPCo"), as shown by schedules of estimated avoided costs filed by IPCo with the OPUC in August, 1982 or February, 1983. CPN, in contrast, claimed that its actual "avoided costs" were the FERC-set wholesale rates it paid IPCo under the "purchase from another source" language contained in the law's "avoided cost" definition. The dispute was significant because Snow Mountain's price theory, had it prevailed, would have required CPN and its ratepayers to subsidize Snow Mountain's cogeneration project by paying several times as much for the electric power to be acquired from Snow Mountain than they otherwise would.

B. The 1983-1984 OPUC Proceedings And Snow Mountain's Unsuccessful FERC Complaint

CPN's position in the OPUC proceeding initiated by Snow Mountain (docketed as UM 11) was stated by the first affirmative defense of its Answer, as follows:

> "CPN is a non-generating utility, buying virtually all of its power from Idaho Power Company (IPC) pursuant to wholesale tariffs subject to approval by the Federal Energy Regulatory Commission (FERC). As such, CPN's avoided cost is equal to its purchased power costs from IPC and is not equal to IPC's avoided cost."

In July, 1984, while the OPUC proceeding initiated by Snow Mountain was still pending, Snow Mountain attempted to get the FERC to intercede and give it rates based upon IPCo's avoided cost by filing a complaint with the FERC against CPN and IPCo. On March 19, 1985 the FERC dismissed Snow Mountain's Complaint on motions of the defendants (in which the OPUC joined after intervening), stating:

> "Snow Mountain's complaint will be dismissed. As the Commission has previously noted, complaints regarding an alleged refusal to purchase power from a qualifying facility and the rates for such purchases are matters properly brought in a State forum. Also, as noted above, the Oregon Commissioner has concluded his proceedings considering these issues by establishing avoided cost rates for CPN and requiring it to purchase from Snow Mountain. If Snow Mountain is dissatisfied with the Oregon Commissioner's determinations, or if CPN should fail to abide by them, then Snow Mountain should pursue that matter in a State forum of competent jurisdiction. Snow Mountain's other requests for declaratory relief have no basis." (30 FERC ¶ 61,293, p 61,589 (March 19, 1985))

In November of 1984, the OPUC entered Order No. 84-895 (Pet App, p B58), which sustained CPN's position that the purchase price for Snow Mountain's power must be based upon CPN's avoidable wholesale power purchase costs, not upon the higher avoided costs of its supplier, Idaho Power Company:

> "PURPA and the Commissioner's Rules require the utility to pay its avoided cost. CPN's avoided cost is not Idaho Power's avoided cost.

> Since it is a purchasing utility and not a generating utility, its avoided cost is its contract price [with its primary power supplier, Idaho Power Company], not the supplying utility's avoided cost." (Pet App at B64)

Attached to Order No. 84-895 was a "Power Sales Agreement" which contained (pp 4-5) the power purchase rates set by the OPUC. Snow Mountain did not "sign and file the attached contract," as provided, but sued the OPUC in Multnomah County Circuit Court (Case No. A8501-00567) under Or Rev Stat 756.580.

C. Snow Mountain's First Multnomah County Circuit Court Suit And The Decision In Snow Mountain I

In the 1985 Multnomah County Circuit Court suit the trial court reversed the OPUC on two points pertinent here (Pet App, p B50). First, the court ruled that the OPUC should have determined the purchase rate as of July 6, 1983, not as of November 13, 1984 (the date Order No. 84-895 was entered). Second, the court ruled that the price should have been determined from the avoided cost schedule filed by IPCo in February, 1983, rather than from CPN's actual avoided costs. The OPUC and CPN appealed, and the Oregon Court of Appeals issued its opinion [*Snow Mt. Pine Company v. Maudlin*, 84 Or App 590, 734 P2d 1366, *rev den* 303 Or 591 (1987), (Pet App, pp B33-49, B32)] on April 8, 1987, ruling that:

> "Here, CP must pay for the power at a rate projected from its [not IPCo's] July, 1983, actual 'avoided costs,' "

and ordering:

> "The part of the circuit court judgment saying that the purchase price is to be determined from the [IPCo] 'avoided cost' schedule on file July 6, 1983, is reversed; otherwise the judgment is affirmed; the commissioner's order is reversed and remanded for a determination of CP National's actual 'avoided costs' as of July 6, 1983, projected over the life of the obligation * * * ." (Pet App at B49, 84 Or App at 601, 734 P2d at 1372)

Snow Mountain promptly filed a Petition for Review which asserted (Rec 13, Exhibit E, p 22)[2] that the case had been "incorrectly decided" by the Oregon Court of Appeals, and asked that the Oregon Supreme Court " * * * grant review, provide a correct statement of the law, and hold that no remand is necessary because the circuit court's judgment [which the Oregon Court of Appeals had expressly reversed] is correct." Acting under ORAP 10.10(1) the Oregon Court of Appeals denied reconsideration on June 12, 1987 (Pet App, p B32), and the Oregon Supreme Court denied review on July 8, 1987. (Pet App, p B31)

Snow Mountain's attempt to reverse, or change, the 1987 decision in *Snow Mountain I* did not stop there. On July 30, 1987, Snow Mountain moved the Oregon Court of Appeals to alter its remand instructions (Rec 13, Exhibit K) so as to provide for a " * * * remand to Multnomah County Circuit Court for determination of whether CP National's actual avoided costs as of July 6, 1983, projected over the life of the obligation, can be determined

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[2] The citations are to the record in the Oregon Court of Appeals in *Snow Mountain II*.

on the present record or whether a remand to the Public Utility Commission is necessary for that purpose." The motion was denied. (Pet App, p B30)

In November, 1987, in another Oregon circuit court suit against CPN which was recently dismissed and is now on appeal (CA No. A63075), Snow Mountain gave the trial court this account of the ultimate disposition of the *Snow Mountain I* appeal:

> "There were two principal issues to be decided on appeal in *Snow Mountain Pine Company v. Gene Maudlin and CP National Corporation*. First, the time at which CP National's obligation to purchase arose and, second, the price to be inserted into the 20 year contract the Commissioner created compelling CPN to purchase. The Court of Appeals' decision affirmed the finding of Judge Snouffer that CPN was required to purchase when Snow Mountain first offered its power on July 6, 1983. *On the issue of price, however, the Court of Appeals declined to order the Public Utility Commission to insert directly into the contract the February, 1983 avoided cost schedule which Judge Snouffer had ordered to be used in the contract*. The Court of Appeals remanded the issue of price to the Commission." (emphasis added)

This 1987 account is significant because Snow Mountain did not then petition the U.S. Supreme Court for a Writ of Certiorari, but chose instead to try to undermine and reverse the Oregon Court of Appeals' decision in the OPUC remand proceedings which followed.

D. The OPUC Remand Proceeding, Snow Mountain's Second FERC Petition And Second Multnomah County Circuit Court Suit

After the OPUC reacquired jurisdiction on remand, Snow Mountain filed a motion to reinstate that portion of the trial court Judgment which the Oregon Court of Appeals had reversed in *Snow Mountain I*. That motion was denied by OPUC Order No. 88-153 for these reasons:

> "In a nutshell, Snow Mountain wants this Commission to declare that the CPN avoided cost schedule on file on February, 1983 was CPN's actual avoided cost on July 6, 1983, even though the filing was actually Idaho Power's avoided cost. It was this February, 1983 schedule that the Circuit Court adopted. The Court of Appeals specifically reversed the Circuit Court on this point and remanded the matter to the Commission to determine CPN's 'actual "avoided cost" as of July 6, 1983, projected over the life of the obligation;. . . .'
>
> "Granting Snow Mountain's motion would ignore the Court of Appeals opinion and its remand, and would be contrary to the court's determination that the Circuit Court decision simply to use the 'avoided cost' schedule on file was error. * * * ." (Pet App, pp B27-28)

Snow Mountain next filed a Petition for Reconsideration of the order denying its motions, which the OPUC denied by Order No. 88-527 (Pet App, p B23) on May 12, 1988. On May 2, 1988, before its reconsideration petition had been denied, Snow Mountain filed a second Petition with the FERC (Rec 36, Exhibit B), which asked the federal Commission to intercede and force the OPUC to apply the law Snow Mountain's way. However, Snow

Mountain shortly changed its mind and, on May 20, 1988, withdrew its FERC Petition, giving these reasons:

> "Proceedings involving these issues are continuing in front of the Oregon Public Utility Commission. Some of the conditions which suggested the filing of the petition have changed. These include the timing of the process and substantive decisional developments. Snow Mountain has determined that it is appropriate at this time to pursue its rights through the Oregon Public Utility Commission. The withdrawal of Snow Mountain's petition will advance the interests of economy, efficiency and speedy resolution of the issues." (Rec 48, Exhibit A)

In less than three weeks, midstream in the OPUC remand proceeding, Snow Mountain filed a second suit against the OPUC and CPN in Multnomah County Circuit Court. At a hearing held on October 6, 1988, the trial court granted the OPUC's and CPN's motions to dismiss, and a Judgment dismissing Snow Mountain's case was entered on October 24, 1988. On November 15, 1988 Snow Mountain appealed again to the Oregon Court of Appeals (CA No. A50333). That appeal remained pending for some time on Snow Mountain's motion for an indefinite stay of proceedings, but was ultimately dismissed.

E. The OPUC's Final Remand Order Setting The Purchase Price For Snow Mountain's Power

On December 5, 1988 the OPUC entered final remand Order No. 88-1419 (Pet App, p B8), setting the rate for purchase of Snow Mountain's power in accordance with the Court of Appeals' mandate in *Snow Mountain I*. The

Order (Pet App, p B22) gave Snow Mountain until December 30, 1988 to sign the contract and bind CPN by its terms. Snow Mountain did not sign the contract, but on December 15, 1988 filed its third Multnomah County Circuit Court suit against the OPUC and CPN claiming that Order No. 88-1419 was unlawful, unreasonable and contrary to the decision in *Snow Mountain I*.[3]

F. Snow Mountain's Third Multnomah County Circuit Court Suit, And The Trial Court's Judgment Affirming The OPUC's Final Order on Remand

Snow Mountain's initial complaint sought to relitigate all issues which had been addressed in Snow Mountain's first appeal to Multnomah County Circuit Court which culminated in the Oregon Court of Appeals' decision in *Snow Mountain I*. On Joint Motion of the OPUC and CPN, the bulk of Snow Mountain's allegations were stricken, and Snow Mountain filed an Amended Complaint. Only Count One of that complaint was involved on the appeal in *Snow Mountain II*. [Snow Mountain did not challenge the OPUC's determination of CPN's actual avoided costs.]

On July 31, 1989, the trial court issued a Letter Opinion (Pet App, p B3) ruling that, "Because there is substantial evidence in the record to support the commission's

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[3] In February, 1989 Snow Mountain filed an identical suit in Marion County Circuit Court which was transferred to Multnomah County Circuit Court (Case No. A8907-03971) on motion of CPN and the OPUC, and then consolidated by order dated August 25, 1989 with Multnomah County Circuit Court case No. A8812-06809 filed in December, 1988.

findings of fact, and because its conclusions are reasonable and lawful, Order 88-1419 will be affirmed" (Pet App, p B7). Agreeing with the Commission that, " * * * CP's actual avoided cost as of July 6, 1983, was the wholesale rate which the utility paid to Idaho Power and *not* Idaho Power's avoided costs as reflected in the Feb., 1983 schedule" (Pet App, p B5); (emphasis in original), the trial court rejected Snow Mountain's position, using these words:

> "Snow Mountain says that the Feb., 1983, schedule is not only the 'starting point' but also the ending point; that the schedule is both Alpha and Omega. The argument is that the Court of Appeals mandated only that the schedule be modified or adjusted by the regulatory factors of OAR 860-29-040(6); that such adjustment had already occurred, unbeknownst to this court or the Court of Appeals; and that therefore the schedule should be reinserted into the contract. But the Court of Appeals ordered otherwise. Snow Mountain's Herculean efforts to persuade the PUC to reinstate the Feb., 1983, schedule into the contract were properly rejected. They likewise are rejected by this court." (Pet App, p B6)

After Judgment was entered against it, Snow Mountain appealed to the Oregon Court of Appeals. Because the Appendix to Snow Mountain's Petition (Pet App, pp B2-3) does not report the decision in *Snow Mountain II* as required by Supreme Court Rule 14.1(k)(i), we repeat the full text of that opinion here:

> "PER CURIAM
>
> "Snow Mountain Pine Company appeals from a decision of the circuit court affirming an order of the Public Utility Commission (PUC) on

> remand from this court. *Snow Mt. Pine Company v. Maudlin*, 84 Or App 590, 734 P2d 1366, *rev den* 303 Or 591 (1987). It contends that PUC's decision is inconsistent with our remand instructions or, in the alternative, that our opinion and remand instructions were wrong. We adhere to our opinion and conclude that PUC complied with our instructions on remand.
>
> "Affirmed." (102 Or App at 689, 795 P2d at 611)

Snow Mountain again petitioned the Oregon Supreme Court to review and reverse the Oregon Court of Appeals' decision, but the Oregon Supreme Court denied review on November 20, 1990 (Pet App, p B1), and the Appellate Judgment was issued by the Oregon Court of Appeals on January 2, 1991. Snow Mountain's Petition for a Writ of Certiorari to the Oregon Supreme Court followed.

REASONS FOR DENYING THE WRIT

It is not clear from Snow Mountain's Petition what Snow Mountain wants this court to do, or why. We briefly address three reasons why we believe the Petition should be denied.

A. Snow Mountain's Petition Seeks Review Of A 1987 Decision And Is, Thus, Untimely.

As just demonstrated, the 1990 decision of the Oregon Court of Appeals in *Snow Mountain II* is a one-paragraph *per curiam* decision which merely adheres to

the court's 1987 decision in *Snow Mountain I*, and concludes that the OPUC complied with its remand instructions. *Snow Mountain I*, rendered in 1987, is the decision on the merits with which Snow Mountain disagrees. If Snow Mountain was aggrieved, as it claims, it should have filed a Petition for a Writ of Certiorari after the 1987 decision in *Snow Mountain I*, following the Oregon Supreme Court's denial of its Petition for Review (Pet App, p B31) on July 8, 1987.

Moreover, the sole issue decided in *Snow Mountain II* that was not fully addressed and resolved in *Snow Mountain I* was the determination that the OPUC had in fact complied with the court's remand instructions in *Snow Mountain I*. This determination provides no "federal ground" for requesting, or granting, a Writ of Certiorari. *Herb v. Pitcairn*, 324 US 117, 125-26 (1945)

B. Snow Mountain Did Not Raise Any Federal Constitutional Issues In The Oregon Appellate Courts.

Snow Mountain's Petition cites Article VI, Clause 2 and Amendments V and XIV to the U.S. Constitution (Pet App, pp A1-2) and obliquely suggests that the results of its litigative efforts, culminating in the decision in *Snow Mountain II*, somehow violate its (or Raymond Feichtmeir's) rights under the U.S. Constitution.

Snow Mountain did not raise any federal constitutional issue, or even cite a provision of the U.S. Constitution, in *Snow Mountain I* or *Snow Mountain II*. To demonstrate this, we have reproduced in the Appendix hereto the Index of Authorities from Snow Mountain's briefs in *Snow Mountain I* and *Snow Mountain II*. Issues

not raised in the state appellate court do not provide a basis for issuance of a Writ of Certiorari:

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system (citations omitted)." *Webb v. Webb*, 451 US 493, 496-97 (1981)

See also, McGoldrick v. Compagnie Gen. Transatlantique, 309 US 430, 434-35 (1940); *Illinois v. Gates*, 462 US 213 (1983); and *Cardinale v. Louisiana*, 394 US 437, 400-01 (1969).

C. Snow Mountain's Price Theory Is Incompatible With The Unambiguous Price Provisions Of PURPA.

A Petition for Certiorari should not be seriously considered when the petitioner's claim is patently invalid.

As demonstrated above, the rate for purchase of cogenerated power under PURPA is anchored to the "avoided cost" of the purchasing utility (here CPN) and,

> " 'Avoided cost' means the incremental cost to a public utility of electric energy or capacity, or both, which the public utility would generate itself *or purchase from another source* but for the purchase from a cogeneration facility or a small power production facility." (emphasis added)

As CPN was a non-generating utility its "avoided cost" was the cost of purchasing power wholesale from Idaho Power Company at rates set by the FERC, not Idaho Power Company's or some other utility's "avoided cost." Snow Mountain's contrary position is thus untenable on

its face, as the OPUC and the Oregon trial and Oregon appellate courts have held.

It is also not clear why Snow Mountain refers to and then seemingly criticizes the *Afton*[4] decisions at pages 12-13 of its Petition. None of the *Afton* cases involved the attempt of a cogenerator to obtain rates based upon the "avoided costs" of a utility other than the buying utility, as Snow Mountain unsuccessfully sought to do in the proceedings below. Indeed, to our knowledge, no court – state or federal – except for the Oregon courts, has ever considered or passed upon Snow Mountain's curious position.

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[4] *Afton Energy, Inc., v. Idaho Power Company,* 107 Idaho 781, 693 P2d 427 (1984); *Idaho Power Company v. Idaho Public Utilities Commission,* 107 Idaho 1122, 695 P2d 1261 (1985); *Afton Energy, Inc. v. Idaho Power Company,* 111 Idaho 925, 729 P2d 400 (1986); *Afton Energy, Inc. v. Idaho Power Company,* 114 Idaho 852, 761 P2d 1204 (1988).

CONCLUSION

Snow Mountain's 1991 Petition for a Writ of Certiorari seeking review of a 1987 decision of the Oregon Court of Appeals is untimely, groundless, and should not have been filed. It should now be denied.

Respectfully submitted,

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